FILED
NOV 22 1974
MICHAEL RODAK, JR., CLERK

No. 74-634

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
PAUL L. FRIEDMAN,
Assistant to the Solicitor General,
PETER M. SHANNON, Jr.,
IVAN MICHAEL SCHAEFFER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision, statute and rule involved	2
Statement	4
Reasons for granting the writ	12
Conclusion	26
Appendix A	1a
Appendix B	25a
Appendix C	26a

CITATIONS

Cases:

California v. *Byers*, 402 U.S. 424	15
Couch v. *United States*, 409 U.S. 322	17
Dennis v. *United States*, 384 U.S. 855	15
Giles v. *Maryland*, 386 U.S. 66	24
Harris, Matter of, 221 U.S. 274	17
Harris v. *New York*, 401 U.S. 222	12, 14, 18–19, 20
Hickman v. *Taylor*, 329 U.S. 495	25
Jencks v. *United States*, 353 U.S. 657	24
McGautha v. *California*, 402 U.S. 183	14, 18, 19
Miranda v. *Arizona*, 384 U.S. 436	20
Murphy v. *Waterfront Commission*, 378 U.S. 52	17
Palermo v. *United States*, 360 U.S. 343	24
People v. *Damon*, 24 N.Y. 2d 256, 247 N.E. 2d 651, 299 N.Y.S. 2d 830	15, 17
People v. *Sanders*, 110 Ill. App. 2d 85, 249 N.E. 2d 124	15, 25
Raffel v. *United States*, 271 U.S. 494	18
Saunders v. *United States*, 316 F. 2d 346	25
Schmerber v. *California*, 384 U.S. 757	15, 17
State v. *Montague*, 55 N.J. 387, 262 A. 2d 398	15, 22, 25
State ex rel. Sikora v. *District Court*, 154 Mont. 241, 462 P. 2d 897	21
United States v. *Dionisio*, 410 U.S. 1	15
United States v. *Mara*, 410 U.S. 19	15

Cases—Continued

	Page
United States v. *Nixon*, No. 73–1766, decided July 24, 1974	14, 21
United States v. *Wright*, 489 F. 2d 1181	15, 16
Walder v. *United States*, 347 U.S. 62	19
Wardius v. *Oregon*, 412 U.S. 470	14, 15, 19
Williams v. *Florida*, 399 U.S. 78	14, 19, 20, 21

Constitution and statutes:

United States Constitution, Fifth Amendment	2, 11, 13, 14, 16, 17, 19, 21
Jencks Act, 18 U.S.C. 3500	2–3, 12, 23, 24
18 U.S.C. 2113(a)	5
18 U.S.C. 2113(d)	5
18 U.S.C. 4208(a)(2)	5

Miscellaneous:

Advisory Committee Note to Rule 16, Federal Rules of Criminal Procedure, 18 U.S.C. App., pp. 4493–4494	23–24
Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966)	13
H.R. 5463, 93d Cong., 2d Sess	25
Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276 (1966)	24
Rule 16, Federal Rules of Criminal Procedure	3–4, 9, 11, 12, 23
Rule 612, Proposed Federal Rules of Evidence (56 F.R.D. 276)	25

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 501 F. 2d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1974 (App. B, *infra*). On September 23, 1974, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* (App. C, *infra*). By order of October 12, 1974, Mr. Justice

Douglas extended the time for filing a petition for a writ of certiorari to and including November 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a criminal trial, after the completion by the government of its case-in-chief and following the direct examination of a defense witness, the court may require the defense to provide the prosecutor, for the purpose of possible impeachment on cross-examination, prior written statements of the defense witness relating to the subject matter of his testimony.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. 18 U.S.C. 3500 (the Jencks Act) provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as

> hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

3. Rule 16 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (B) OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES
>
> * * * Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of

statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(C) DISCOVERY BY THE GOVERNMENT

If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respon-

dent and two others [1] were convicted of bank robbery, in violation of 18 U.S.C. 2113(a), and assault with a dangerous weapon in the commission of the robbery, in violation of 18 U.S.C. 2113(d). Each defendant was sentenced to a term of twenty-five years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). Over the dissent of one judge, the court of appeals reversed respondent's conviction (App. A, *infra*).[2]

1. On the morning of February 6, 1973, at approximately 11:30 a.m., four men entered and robbed a branch of the Crocker National Bank in Los Angeles, California (Tr. 13–25, 185–186). One, identified as co-defendant Brown, jumped behind the tellers' windows and moved down the line of cages, collecting a total of $4,031 from the cash drawers (Tr. 18–20, 187–194). Meanwhile, brandishing weapons and guarding the customers and bank employees from various positions in the bank, the other three men assured that no one would interfere with Brown's labors. The man identified as respondent, armed with a revolver, performed his part in the robbery while standing directly beneath the bank's automatic surveillance camera and thus was the only one of the robbers whose activities in the bank were not captured on film for the jury to view (Tr. 22–23, 192–194, 323–324).

[1] Indicated, tried, and convicted with respondent were Tommie Louis Brown and Virgil David Swain. A fourth person, Jonathan Ray Nobles, was also indicted but was a fugitive at the time of trial.

[2] The court unanimously affirmed the convictions of Brown and Swain.

Accordingly, at trial the evidence against respondent consisted exclusively of the testimony of two eyewitnesses, Peter Van Gemeren, a bank teller (Tr. 22–23), and Gary Hoffman, a salesman visiting the bank (Tr. 323–325, 420–421). Van Gemeren testified that during the robbery he observed respondent for approximately one minute from a distance of twenty feet and that he gave a detailed description of him to the F.B.I. (Tr. 61–62). Hoffman testified that he observed respondent standing beneath the surveillance camera (Tr. 323–325; see also Tr. 416), and that he focused his attention on respondent for a full two or three minutes, one-third of the time that the robbery was in progress (Tr. 328, 353). Hoffman also gave a description to the F.B.I. (Tr. 329). Hoffman further testified that, prior to trial, he identified respondent from a photographic array and at a police lineup (Tr. 328–331; see also Tr. 420–421). While respondent presented an affirmative defense of alibi, his strongest defense, as the court of appeals noted (App. A, *infra,* p. 6a), was his attempt to discredit the testimony of Van Gemeren and Hoffman.

2. During his cross-examination of Van Gemeren, respondent's counsel asked the witness whether he recalled being interviewed by a Public Defender's office investigator, John Bond (Tr. 77). It soon became apparent that the witness was unsure of whether the particular interview had taken place and, if it had, of the nature of his responses to questions that may have been asked in the course of the interview. The government thereupon requested, and respondent's counsel agreed, that the witness be allowed to

examine his alleged statement for the purpose of refreshing his recollection (Tr. 77–78). However, the statement was not in fact shown to the witness during the overnight recess.

When the trial resumed the following morning, respondent's counsel asked Van Gemeren whether it was not a fact that he had told the defense investigator that he had seen only the back of the robber who had been standing under the surveillance camera; Van Gemeren did not recall (Tr. 90). Government counsel again requested that the witness be allowed to refresh his recollection by reviewing the prior statement that he had allegedly given to the investigator (Tr. 90). Counsel for respondent then stated that he had not allowed Van Gemeren to examine the alleged statement during the overnight recess, as he had previously agreed to do, because he had reconsidered his position on the matter: "I had agreed to that, your Honor, and after saying that yesterday, I talked it over with several other attorneys in our office. It is our position that we do not have to do that because I am only trying to use this interview for impeachment purposes" (Tr. 91). The court ordered counsel to allow the witness to examine the purported statement (Tr. 91–92). Counsel then tore off a strip of paper from his investigator's report, showed it to the court, and had it marked as Defense Exhibit A for identification (Tr. 92–94).[3] After Van

[3] Exhibit A, the purported statement of Van Gemeren, did not contain the witness's name or the date, time, or place of the alleged statement. Moreover, the witness had never read, approved, signed, or adopted any statement.

563-470 O - 74 - 2

Gemeren examined the paper, he testified that it refreshed his recollection but that he still did not recall having told the investigator that he had seen only the back of the robber standing under the surveillance camera (Tr. 99). He further testified, in response to a question from respondent's counsel, that in fact he had not seen only the back of the robber under the camera (Tr. 100).

3. During the cross-examination of prosecution witness Hoffman by respondent's counsel, the following colloquy occurred regarding a telephone conversation that Hoffman had had with the same Public Defender's office investigator, John Bond (Tr. 404):

> RESPONDENT'S COUNSEL: And isn't it a fact that you told Mr. Bond that to you all blacks appear to be alike?
>
> THE WITNESS: I don't believe I indicated that to him.
>
> RESPONDENT'S COUNSEL: You don't recall stating that to Mr. Bond?
>
> THE WITNESS: No, I do not.
>
> RESPONDENT'S COUNSEL: That all blacks look alike?
>
> THE WITNESS: No, I do not, sir.

At the bench, the prosecutor requested respondent's counsel to furnish him with a copy of the memorandum containing Hoffman's purported statements to Bond (Tr. 405–407). Respondent's counsel refused to allow the prosecutor to inspect the memorandum. The judge then indicated that, in the absence of legal authority precluding such inspection, he would require disclosure (Tr. 405);

> It seems only fair, if the government gives you copies of all the statements made. I think that the Government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made.

The court stated that it would reserve ruling on the government's motion for production until a hearing was held on the matter (Tr. 411). After hearing argument on the motion, the court narrowly defined the issue before it, concluded that Rule 16 of the Federal Rules of Criminal Procedure applied only to pre-trial discovery and was thus inapplicable, and then ruled as follows (Tr. 466, 470–471):

> First of all, the Court is not going to order disclosure of this memorandum at this time. At the present time there has been no impeachment and will be no impeachment until the investigator takes the stand and testifies as to the allegedly impeaching statements.
>
> Therefore, the issue will not arise until the investigator does take the stand. The issue thereafter will be whether or not for utilization for impeachment purposes the government should be entitled to examine the memorandum made by the investigator, presumptively concurrently with his inquiry of the allegedly impeached witness for purposes of furthering the government's cross examination.
>
> * * * * *
>
> [T]he government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoff-

man's testimony relative to his inability to distinguish between people of the black race.

And if he does make such a statement, if he [Mr. Bond] make[s] such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony.

The issue, of course, may not arise. It is dependent upon whether or not Mr. Bond is called to testify, but that is the Court's view at this time.

* * * * *

I will say this to assist you, Mr. Allis [respondent's counsel], while I think about it. I am sure there are no statements by any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda you may have.

It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature.

I am specifically concerned only with the Hoffman statement of Mr. Bond.

4. As a part of the defense case, counsel for respondent called John Bond as a witness, without first indicating whether he intended to comply with the court's previous ruling regarding production of Bond's

investigative report (Tr. 518–519). When the court requested an offer of proof as to Bond's testimony, respondent's counsel stated that Bond would impeach the testimony of the witnesses Van Gemeren and Hoffman (Tr. 519), but that he would not turn over these witnesses' statements following Bond's direct testimony (Tr. 520). The court reiterated its ruling (Tr. 520–528) and stated that, in the absence of disclosure of the relevant portions of the investigative report, Bond would not be permitted to testify regarding his interviews with Van Gemeren and Hoffman (Tr. 520). Bond then testified, but, pursuant to the court's order, he was not asked to impeach the identification testimony of Hoffman or Van Gemeren.

5. Respondent was convicted. On appeal, respondent contended that the district court's ruling violated his privilege against self-incrimination, denied him the right of cross-examination, and was contrary to the limitations contained in Rule 16 of the Federal Rules of Criminal Procedure.

A divided panel of the court of appeals reversed. The majority found prejudicial error in conditioning impeachment upon disclosure to the prosecutor of portions of the investigative report, even though this discovery would only be used as an aid to cross-examination by the government. The court held that allowing discovery by the government of those portions of Bond's report relating to conversations about which Bond sought to testify during trial would violate respondent's Fifth Amendment privilege against compulsory self-incrimination (App. A, *infra,* pp. 9a–14a).

Moreover, although the disclosure would not take place until after the government's case-in-chief at trial, the majority deemed the required production of the investigator's notes to be a violation of the attorney work-product rule that it found to be embodied in Rule 16 (App. A, *infra,* pp. 15a–18a).

The dissenting judge, proceeding essentially on the premise that "[t]he purpose of a trial is to develop the truth, not suppress it" (App. A, *infra,* p. 22a), concluded that there was no error in requiring a witness called for impeachment purposes to produce the notes which he made on the subject of impeachment and which form the basis of his testimony. Relying in part on this Court's opinion in *Harris* v. *New York,* 401 U.S. 222, he was of the view that the Fifth Amendment's privilege against self-incrimination did not bar the trial court from ordering disclosure (App. A, *infra,* p. 22a). He also concluded that the majority's reliance on Rule 16, which governs pretrial discovery, and on the Jencks Act, 18 U.S.C. 3500, was misplaced (App. A, *infra,* p. 24a).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the access for impeachment purposes that a prosecutor should have, following the testimony of a defense witness on direct examination, to prior and possibly inconsistent statements made by that witness, particularly when the witness has been called for the purpose of impeaching the testimony of a government

witness who has previously testified. The holding of the court of appeals precluding production of such documents undermines the truth-seeking process of the criminal trial, and does so by means of an unwarranted extension and misapplication of the Fifth Amendment privilege against compulsory self-incrimination. The decision of the court impedes effective cross-examination through impeachment by prior inconsistent statements, dilutes the traditional discretion of the trial judge to rule on evidentiary matters and, at its worst, may foster misstatement, exaggeration or even perjury on the part of defense witnesses, particularly partisan investigators whose use by defense counsel understandably is increasing with the establishment and growth of well-organized public defender agencies.[4]

In its efforts to protect what it viewed as respondent's Fifth Amendment privilege, the majority below lost sight of the fact that the ascertainment of truth is the ultimate objective of a criminal trial and that

[4] This is of particular concern in light of the view, which surprisingly has achieved respectability in some circles, that a defense attorney may call a witness to testify although he knows the witness will commit perjury. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 Mich. L. Rev. 1469 (1966). A combination of this view on the part of an investigator and defense attorney with the Ninth Circuit's holding that disclosure of prior statements may not be ordered by a trial judge could easily frustrate the search for truth and the ends of justice in a criminal trial.

the existence of an adequate opportunity, through cross-examination, to test the credibility of a witness who takes the stand, whether for the prosecution or the defense, is crucial to the realization of that goal. It overlooked the established principle that the effort to find the truth should give way only in the face of a recognized privilege or some countervailing policy to which the Constitution compels deference or the legislature or rule-makers have accorded priority.

Moreover, the decision of the court is in conflict on many fronts with the philosophy of prior decisions of this Court. See *United States* v. *Nixon,* No. 73–1766, decided July 24, 1974, slip op., pp. 24–25 (the privilege against self-incrimination, like other privileges, is to be construed narrowly because it is in derogation of the search for truth); *Harris* v. *New York,* 401 U.S. 22 (the shield of the Fifth Amendment privilege cannot be perverted into a license to use perjury free from the risk of confrontation with prior inconsistent statements); *McGautha* v. *California,* 402 U.S. 183 (the privilege against self-incrimination is not diminished by a defendant's decision to testify, although that decision may open the door to otherwise inadmissible evidence that may be damaging to his case); *Williams* v. *Florida,* 399 U.S. 78 (even pretrial, the defendant may be precluded from concealing evidence about his alibi defense when its disclosure would enhance the search for truth); *Wardius* v.

Oregon, 412 U.S. 470 (discovery must be a two-way street, and reciprocal disclosure may be required in some contexts because it enhances the search for truth); *Schmerber* v. *California,* 384 U.S. 757 (the compulsory production of certain types of evidence is consistent with the privilege against self-incrimination even though it may be a "vital link" in the chain of evidence against the accused; see also *United States* v. *Dionisio,* 410 U.S. 1; *United States* v. *Mara,* 410 U.S. 19; *California* v. *Byers,* 402 U.S. 424); *Dennis* v. *United States,* 384 U.S. 855 (disclosure rather than suppression of relevant materials promotes the proper administration of criminal justice). It is also at odds with the decisions of the appellate courts of each State that, so far as our research discloses, has considered the issue.[5]

1. The court of appeals held that the order to disclose relevant portions of the defense investigator's report violated the defendant's privilege against compulsory self-incrimination. Quoting from the District of Columbia Circuit's opinion in *United States* v. *Wright,* 489 F. 2d 1181, 1195 (C.A.D.C.), the court embraced the following view (App. A, *infra,* p. 14a):

> The defendant has a right under the Fifth Amendment to compel the state to investigate

[5] *State* v. *Montague,* 55 N.J. 387, 262 A. 2d 398; *People* v. *Sanders,* 110 Ill. App. 2d 85, 249 N.E. 2d 124; *People* v. *Damon,* 24 N.Y. 2d 256, 247 N.E. 2d 651, 299 N.Y.S. 2d 830. The only other federal decision concerning this issue is *United States* v. *Wright,* 489 F. 2d 1181 (C.A.D.C.), in which a divided panel of the District of Columbia Circuit concluded that it was error for the trial court to have ordered disclosure of an investigator's report.

563-470 O - 74 - 3

> its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution against the accused.[6]

The court suggested that "[i]f the prosecutor doubted the validity of the contexts in which the purported statements were made as testified to by Bond, he surely had access to his own witnesses and by their testimony could have offered rebuttal to Bond's version" (*ibid.*).

This analysis both misses the point and reflects a misunderstanding of the Fifth Amendment's privilege

[6] The majority's reliance on *Wright* was misplaced, as the dissenting judge in this case made clear (App. A, *infra*, p. 23a; emphasis in original).

> (1) [I]n *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than specific portions relevant only to the impeachment question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. * * * Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

against compulsory self-incrimination. The privilege is "a *personal* privilege: it adheres basically to the person, not to information which may incriminate him." *Couch* v. *United States,* 409 U.S. 322, 328. Moreover, the privilege applies only to a defendant's own testimony or to evidence relating to some communicative act or writing of the defendant himself (*Schmerber* v. *California, supra,* 384 U.S. at 761, 765), and not, as found by the court here, to statements or notes of a defense investigator concerning his interviews with witnesses to the offense who presumably would testify for the government. Finally, it cannot be said in this case that respondent was *compelled* to produce incriminating statements in the Fifth Amendment sense, for he was not forced to produce the tesimony of John Bond; it was his decision to call the investigator in his behalf. See *People* v. *Damon, supra,* 24 N.Y. 2d at 261, 247 N.E. 2d at 654, 299 N.Y.S. 2d at 834. Thus, the court of appeals erred both because the privilege did not apply to the communications at issue and because there was no compulsion to produce those communications. Indeed, none of the values reflected by the privilege against self-incrimination and comprehensively catalogued by the Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55, was compromised by the district court's order to disclose relevant portions of the investigator's report. Rather, that order reflected the court's adherence to the admonition of Mr. Justice Holmes, speaking for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279–280: "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

The court of appeals, we submit, adhered much less well than the district court to the teachings of this Court. First, it failed to distinguish between statements of an accused and those of a witness for the accused, and it ignored the fundamental difference between compelled testimony and that which is volunteered: the statements at issue were not those of respondent but of a witness offered by respondent. Second, it failed to recognize that respondent was not compelled to produce either incriminating statements of his own, substantive evidence against himself, or the smallest link in the evidence necessary to convict himself: disclosure of the investigator's statement would not have been required until long after the government had closed its case-in-chief and had already submitted sufficient evidence to withstand a motion for acquittal. Third, since the choice of whether to call the investigator belonged solely to respondent, any privilege that possibly did exist as to his testimony would have been waived following an election to place the investigator on the witness stand, just as it would have been waived had respondent himself chosen to testify; for "[t]he safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel* v. *United States,* 271 U.S. 494, 499.[7] Finally, if under *Harris* v.

[7] The fact that the trial court conditioned that choice upon disclosure of revelant portions of the investigator's report did not impinge upon the privilege in a constitutionally impermissible manner. Cf. *McGautha* v. *California, supra,* 402 U.S. at 213.

New York, supra, 401 U.S. at 226, respondent would have been unable to use the Fifth Amendment's shield as insulation from his own otherwise inadmissible prior inconsistent statements, there is no conceivable justification for clothing him with protection from prior inconsistent statements made by another whom he chose to call as a witness in his behalf. Cf. *Walder* v. *United States,* 347 U.S. 62, 65.

In *Williams* v. *Florida, supra,* this Court upheld a Florida statute requiring a defendant to give the prosecution prior notice of his intention to raise an alibi defense and, upon the prosecutor's request, to provide a list of alibi witnesses. The defendant's major contention was that "he was 'compelled * * * to be a witness against himself' " because he was forced to give the State information that ultimately proved helpful in convicting him. 399 U.S. at 82. Commenting on this assertion the Court stated (*id.* at 83–84):

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or when may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Cf. *Wardius* v. *Oregon, supra,* 412 U.S. at 474. Similarly, in *McGautha* v. *California, supra,* the Court

noted that the privilege suffers no diminution by a defendant's decision to testify on his own behalf, even though that testimony "may open the door to otherwise inadmissible evidence which is damaging to his case." 402 U.S. at 213.

In *Harris* v. *New York, supra,* a defendant charged with various narcotics offenses took the stand to testify in his own behalf. The prosecution made no attempt during its case-in-chief to introduce certain statements made by the defendant that were concededly inadmissible under *Miranda* v. *Arizona,* 384 U.S. 436. However, these statements were later used to impeach the defendant in a procedure that this Court subsequently approved (401 U.S. at 225–226):

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. * * *
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

We submit that this case falls within the rationale of *Williams* and *Harris.* If an accused can be compelled to disclose the names and addresses of his alibi witnesses before trial, thus affording the government an opportunity to interview them, and if the accused himself can be cross-examined even on the basis of his own prior statements that were unconstitutionally obtained, it follows, *a fortiori,* that he may be compelled during trial to disclose the statements of witnesses whom he chooses to call and that they may be

cross-examined on the basis of their prior statements thus obtained through the lawful processes of the court. "[T]he Constitution does not protect a defendant from the consequences of a defense he makes, nor does it assure him a right to so defend as to deny the state a chance to check into the truth of his position." *State ex rel. Sikora* v. *District Court,* 154 Mont. 241, 244–245, 462 P. 2d 897, 899. If the adversary system of trial "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played" (*Williams* v. *Florida, supra,* 399 U.S. at 82), it hardly seems likely that, in the context of the search for truth, it can be viewed as a game in which the cards can be concealed even *after* they have been played. On the contrary, our system of criminal justice recognizes that

> [t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. [*United States* v. *Nixon, supra,* slip op. at 24.]

Extending the Fifth Amendment's protection against self-incrimination to prior statements of defense witnesses can only serve to exclude meaningful evidence and thus to hinder the fair and just operation of the system. Permitting the prosecutor to examine a witness's prior statement, on the other hand,

would serve to enable him better to conduct a meaningful cross-examination based upon available information, rather than one based upon assumption, hypothesis or innuendo. See *State* v. *Montague, supra,* 55 N.J. at 401–402, 262 A. 2d at 405. Moreover, in this case such a procedure would have better enabled the jury to weigh the testimony of Van Gemeren, Hoffman and Bond, and thus to assess all the relevant facts of the case in reaching its verdict; for then the jury would have had before it the "best evidence" available for assessing the credibility of all of the witnesses.[8]

[8] The dissenting judge in this case accurately summarized our view of the panel's decision (App. A, *infra*, p. 22a):

> * * * In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.
>
> Closely in point is *Harris* v. *New York* [*supra*], where the court approved the introduction of a statement on cross-examination which could not have constitutionally been utilized on the direct examination of the defendant. There the court held that the defendant, having voluntarily taken the stand, was under an obligation to speak truthfully and accurately, and that in confronting him with his previous statement, the prosecution was doing no more than utilizing the traditional truth-testing devices of the adversary process. Here, if produced, the memorandum might show that Bond did not include the alleged material forming the basis for the impeaching questions to Hoffman. If that were true, the integrity of Bond's testimony would be severely diminished. The prosecutor, in requesting the production of the statement for cross-examination, was doing "* * * no more than utiliz[ing] the traditional truth-testing devices of the adversary process." 401 U.S. at 225. One of the most common practices employed in the art of cross-examination is to ask for the production of any notes or statements which a witness may have used to refresh his recollection.
>
> The purpose of a trial is to develop the truth, not suppress it. We can assume that appellant' counsel was not playing games and that the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it.
>
> My conclusions with reference to the questions propounded to Hoffman are equally applicable to the questions propounded to the witness Van Gemeren.

2. In reaching its decision in this case, the court of appeals also examined the district court's production order from the perspective of Rule 16 of the Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. 3500), and the work-product rule. The court erroneously concluded (App. A, *infra,* p. 17a; emphasis in original):

> [W]hile Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads use to conclude that Rule 16 has relevance to discovery *during* trial. And, specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c) [of Rule 16, which governs discovery by the government]. We would conclude that the work product of defense is inviolable under these circumstances.

This is an incorrect reading of both the Jencks Act and Rule 16. To begin with, Rule 16 is inapplicable to this case, since it was clearly intended to apply only to pre-trial discovery. See Advisory Committee Note to

Rule 16, Federal Rules of Criminal Procedure, 18 U.S.C. App., pp. 4493–4494; *Giles* v. *Maryland,* 386 U.S. 66, 101 (Fortas, J., concurring); see also Rezneck, *The New Federal Rules of Criminal Procedure,* 54 Geo. L. J. 1276, 1276–1278 (1966). Subsection (b) of that Rule does not provide for pre-trial discovery by defense counsel of statements by government witnesses, and subsection (c) does not authorize pre-trial discovery by the government of defense witnesses' statements. Nor do these subsections authorize or provide for in-trial discovery or use of witnesses' statements for impeachment purposes. Correctly framed, this is an evidentiary question for discretionary determination by the trial judge, who traditionally has been called upon to regulate the scope of cross-examination. *Palermo* v. *United States,* 360 U.S. 343, 361 (Brennan, J., concurring).

It is true that the Jencks Act, 18 U.S.C. 3500, deals in part with in-trial disclosure. However, the congressional intent in enacting that statute was only to *limit* the right of the defense to the production of statements of government witnesses that courts previously could order produced in the exercise of their inherent discretion. Congress clearly "had no thought to invade the traditional discretion of trial judges in evidentiary matters beyond checking the extravagant interpretations" of the *Jencks* case[9] by the lower federal courts. *Palermo* v. *United States, supra,* 360 U.S. at 361 (Brennan, J., concurring). Congress did not consider the production of

[9] *Jencks* v. *United States,* 353 U.S. 657.

defense witness statements in passing the Jencks Act, since, in such cases, "[f]inal decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge * * * and subject to the appropriately limited review of appellate courts." *Id.* at 353 (opinion of the Court). As the dissenting judges in this case properly stated: "[W]e are not here concerned with the Jencks Act * * * or with Rule 16 * * *. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment" (App. A, *infra,* p. 24a).[10]

[10] Even assuming the court of appeals were correct in stating that "the work product of defense is inviolable" (App. A, *infra,* p. 17a), that doctrine is inapplicable to the case at bar. The work product rule is only intended to protect against inquiry into the mental processes of counsel, including trial strategy, legal opinions or conclusions, and the like; it does not provide protection for written statements of witnesses found in counsel's files that might be useful for purposes of impeachment, corroboration, and truth-finding. See *Hickman* v. *Taylor,* 329 U.S. 495, 510–511; *Saunders* v. *United States,* 316 F. 2d 346, 349–350 (C.A.D.C.). The state appellate courts that have considered this proposition have similarly found the work product rule to be inapplicable in these circumstances. See, *e.g.*, *People* v. *Sanders, supra,* 110 Ill. App. 2d at 89–90, 249 N.E. 2d at 126; *State* v. *Montague, supra,* 55 N.J. at 393, 262 A. 2d at 401.

Rule 612 of the proposed Federal Rules of Evidence (56 F.R.D. 276) as promulgated by this Court, would permit an adverse party to inspect, cross-examine from and introduce portions of a writing used by a witness to refresh his recollection either before or while testifying. The version passed by the House of Representatives on February 6, 1974 (H.R. 5463, 93d Cong., 2d Sess.) requires the trial court to determine in its discretion whether disclosure of a writing used by a witness to refresh his recollection

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
PAUL L. FRIEDMAN,
Assistant to the Solicitor General.
PETER M. SHANNON, JR.,
IVAN MICHAEL SCHAEFFER,
Attorneys.

NOVEMBER 1974.

---

before testifying would serve the interests of justice. The passage of the Rule in either form, however, would not obviate the problem presented by this case. On the one hand, if the court of appeals is correct in its decision, the rule itself may have constitutional infirmities. On the other hand, if we are correct in our view, the ability to get at the truth by the traditional method of cross-examination on the basis of prior inconsistent statements should not turn on whether a particular witness has refreshed his recollection before testifying. The "best evidence" should always be required to be produced, and the inherent power of the district court to authorize discovery by the prosecution commensurate with that permitted the defense under the Jencks Act should not be curtailed.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. TOMMIE LOUIS BROWN, *Defendant-Appellant.*	No. 73-2279
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. VIRGIL DAVID SWAIN, *Defendant-Appellant.*	No. 73-2678
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT LEE NOBLES, *Defendant-Appellant.*	No. 73-2280

[June 10, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY and KILKENNY, Circuit Judges, and
ENRIGHT, District Judge*

ENRIGHT, District Judge:

In late morning on February 6, 1973, four men robbed a Crocker National Bank in Los Angeles. Three men were brought to trial in April, 1973, for the offense: defendants Tommie Louis

---

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

Brown, Robert Lee Nobles, and Virgil David Swain. The fourth man, whose name appeared on the indictment as Jonathan Ray Nobles, was a fugitive at time of trial.

The government's theory was that Brown jumped behind the tellers' windows and moved down the line of cages, collecting money from the cash drawers, while the other three guarded the customers and personnel from various positions. A surveillance camera took pictures of all the participants except the one who stood beneath the camera, allegedly defendant Nobles [hereinafter Nobles].

I *The Brown and Swain Appeals*

The evidence against Brown and Swain was similar and consisted of surveillance photographs, items taken from the apartment they shared, a comparison of photographs, eyewitness identifications, and a statement by Brown.

Defendants Brown and Swain primarily attack the comparison of certain photographs. One group of photographs consisting of enlarged surveillance pictures showing the faces and clothing of the two robbers alleged to be Brown and Swain, were placed on a chart next to a second group of photographs consisting of enlarged police pictures of Brown and Swain as well as FBI photographs of the items of clothing seized from their apartment. An FBI expert in photographic identification, Frederick E. Webb, compared the two groups of photographs and stated that the faces in the police photographs were the same faces as those in the surveillance photographs. He also testified that the clothing in the two groups of photographs was the same, and further, he made a similar analysis of a surveillance photograph of a pistol used in the robbery and a FBI photograph of the handgun seized in the apartment.

When Mr. Webb, in response to the prosecutor's questions, began to state his opinion that Brown and Swain were indeed two of the three pictured on the surveillance film, the district court overruled the defense objection but not without some misgiving:

> I must say in my own personal opinion it comes very, very close to impinging upon the province of the jury . . . . that case [*United States v. Cairns*, 434 F.2d 643 (9th Cir. 1970)] I suggest to you, Mrs. Broady, which seems to authorize this very procedure.

Reporter's Transcript [hereinafter R.T.] 260, lines 5-11. We too are troubled by the proffered testimony.

In *Cairns*, this circuit previously wrote:

> Appellant next contends that over his objection on the ground the testimony would invade the province of the jury, Government's witness, a special agent with the Federal Bureau of Investigation and photographic identification specialist, compared two photographs: a photograph taken by the bank's surveillance camera at the time of the robbery and a police photograph of appellant taken ten days prior to trial. To assist in his identification, he enlarged the head area of the surveillance photograph to the same size as the enlarged head area in the police photograph. The witness then pointed out the similarity in the two photographs in the nose and mouth areas, chin line, hair lines, ear contours and inner folds of the ears, among other things. He then testified that based on all the general characteristics the individual in the surveillance photograph is the individual in the police photograph "or another individual having all of these characteristics as to nose, mouth, chin, and the ear characteristics . . . . "We see no error in the admission of this testimony. While the jury is the sole judge of the facts, expert testimony has long been admissible as an aid to the jury.

434 F.2d at 644.

> That concluding statement is undisputed. But whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952).

Advisory Committee's Note to Proposed Federal Rule of Evidence 702, Court Version, 56 F.R.D. 183, 282 (1972). To permit an expert to testify as to his opinion of parentage based on the resemblance of a child to a reputed father in a paternity suit would be grossly inappropriate by the above standard. But just as surely, fingerprint identification, the comprehensive examination of aerial photographs, and other similar scientific and technical evaluations, are obviously within the realm of permissible expert testimony. Testimony as to whether a particular individual is portrayed in a photograph rests on some middle ground. Since the Cairns decision relied solely upon traditional expertise fields, we feel it incumbent upon ourselves to reexamine the issue faced in *Cairns*.

We have requested and reviewed the briefs submitted in *Cairns*. Such review allows us to conclude that the two cases—*Cairns* and the instant one—are distinguishable.

In the instant case, Webb's testimony was general. In reference to the photographs of Brown, he stated broad conclusions: "rather thin-faced," "somewhat elongated," "[t]he mustache is similar, the shape of the nose, the eyes, the eyebrows, ..." R.T. 260, lines 22-24. In *Cairns*, however, the testimony was of greater detail. Not only did the agent compare general contours and shapes but also found ear and lobe formations particularly significant and termed a particular facial crease as "distinctive" and "unusual." Government's Brief, *United States v. Cairns*, p. 5. In its argument to this court in *Cairns*, the government also emphasized the detail of the agent's testimony, for example, his comparison of a nipple in the center of the defendant's ear. *Id.* at 6.

We would hold that *Cairns* should be limited to the precision as argued in its briefs; therefore, when a party seeks to introduce expert testimony on personal photographic identification—whether to prove *or* disprove similarity, he should first be required to make an offer of proof to the court outside the presence of the jury.

After the elicitation of what facts the expert has depended upon in reaching his conclusions, the court should determine whether it has been convinced by a preponderance that the facts offered are beyond the jury's common experience. Of course, the

court in reaching its determination must take into consideration that the party desiring admission may be free to argue his position without the benefit of expert testimony. If the court in its discretion, which may not be disturbed absent clear abuse, is convinced that the expert may materially assist the jury beyond their common experience as amplified by argument of counsel, the expert should be allowed to testify.

The same general test should be applied to the photographic identification and comparison of inanimate objects. The trial courts, however, should be cognizant that while the everyday experiences of twelve laymen over their combined lifetimes may permit them to make photographic comparisons of persons, they may utterly lack experience to distinguish or recognize certain objects such as firearms. In the facts of this particular case, we would hold the admission of the expert's opinion on the personal identification of Brown and Swain to have been error,[1] but his testimony concerning the items seized to have been properly admitted. We cannot conclude, however, that the error was prejudicial. Disregarding the agent's opinion as to their identity, the evidence against Brown and Swain—the eyewitness testimony, the discovery of the items—was overhelming, rendering the error harmless.

---

[1]The photographs introduced in this case afford a spectrum for aiding a trial court in determining when expert testimony may be permitted. There can be no reasonable doubt that the pictures of the robber who moved from cage to cage was indeed defendant Brown. The resolution of the camera is clear; his likeness unmistakable. Testimony of an expert would be of no useful purpose and hence error, but presumably, harmless.

The pictures of the man who stood to the rear of the bank are of poor resolution and quality. The only articulable characteristics concerning which the expert could testify were generalities, *e.g.*, facial contours, shape of sideburns. This foundation would be inadequate, and expert testimony would be error, perhaps prejudicial, depending upon the state of other evidence.

The third pictured individual was the fugitive, allegedly Jonathan Nobles, brother of defendant Nobles. The resolution of the surveillance pictures is clear, but the conclusion that the individual is Jonathan Nobles after comparison with a known photograph of Jonathan Nobles is not entirely free of doubt. An expert, in our opinion, could be useful. Of course, the discretion would lie with the trial court.

II *Nobles Appeal*

The evidence against Nobles differs from the case against Brown and Swain. Most obvious is the absence of surveillance photographs, for Nobles is alleged to have been the robber who stood underneath the camera rather than within its scope. Second, no objects were found to connect him to the offense in contrast to the items seized at the apartment of Brown and Swain. Finally, the eyewitness testimony was far less impressive against Nobles than against Brown and Swain.

A bookkeeper at the bank identified Brown and Swain in court as well as the items of clothing. He could not identify Nobles. Similarly, the assistant branch manager identified Brown and Swain in court but could not identify Nobles.

A bank teller, Peter van Gemeren, identified Brown in court. He did identify Nobles but his testimony was subjected to extensive cross-examination. Likewise, Gary Hoffman, a salesman visiting the bank, pointed out the men alleged to be Brown and Swain on the surveillance photographs and described their activities; he too identified Nobles as having stood by the business counter. Defense also subjected Hoffman to arduous cross-examination.

Although Nobles presented an affirmative alibi defense, his strongest attack was to discredit the key evidence against him: the eyewitness identification by Van Gemeren and Hoffman. To do so, his counsel not only employed cross-examination but also attempted to introduce expert opinion testimony on the frailties of eyewitness examination in general and to impeach the specific eyewitnesses by statements made by them to his investigator.

A. *Expertise on Eyewitness Identification*

Nobles offered the testimony of Dr. Robert Buckhout as an expert witness to describe the problems of eyewitness identification in general and the specific difficulties with the identifications in this case. The court refused the proffered testimony, concluding that the testimony would invade the province of the jury, that the undue consumption of time would substantially outweigh its probative value, and that the offer of proof was inadequate. We in turn cannot conclude that the trial court was in error. *United States v. Amaral,* 488 F.2d 1148 (9th Cir. 1973).

B. *Impeachment*

During the defense case, counsel sought to introduce the testimony of John Bond, chief investigator for the Federal Public Defenders. Mr. Bond had interviewed the witnesses Van Gemeren and Hoffman. On cross-examination Van Gemeren had testified that he did not recall telling Bond that he had seen only the back of the bank robber beneath the camera; Hoffman, during cross-examination, had denied telling Bond that all blacks look alike. Defense counsel's offer of proof was that Mr. Bond would testify that Hoffman had told him that "all blacks look alike" and that Van Gemeren had told him that "as far as the man at the surveillance camera is concerned, he [Van Gemeren] only saw the back of that man." Eventually, the court ordered that impeachment of the witnesses by Bond through these statements would be conditioned upon the defense agreeing to render to the government upon completion of the investigator's testimony the alleged statements as contained in the investigator's report. Rather than submit to this condition, defense counsel chose to forego impeachment, preferring to stand upon his client's right against self-incrimination as well as the protection of a work product rule.

For the reasons stated below, we would hold that, despite the very limited and seemingly judicious restriction on the defense, conditioning impeachment with prosecutorial discovery was prejudicial error. Admittedly, the order was narrowly drawn. But to single out any one witness and require as a condition precedent that his previous statement be produced is inappropriate. The defendant must have the essential right to call an impeaching witness; he need not corroborate the credibility of that witness before calling him to the stand, *i.e.*, by producing a prior recorded or transcribed statement. Were it otherwise, we would fear that such requested discovery would become a matter of routine, a result we desire to avoid.

Although defense counsel did not argue that the condition impinged on the attorney-client privilege, we deem it appropriate to comment on the relevance of that privilege.

The proposed Rules of Evidence as tentatively promulgated by the Supreme Court [hereinafter Court version] included Rule

503, Lawyer-Client Privilege. 56 F.R.D. 183, 235-240 (1972). That rule in pertinent part states:

> (a)(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional services to the client, ... , (2) between his lawyer and the lawyers representative, ...

Id. at 236. In contrast, the tentative draft of H.R. 5463, 93rd Cong., 1st sess., as amended by the Subcommittee on Criminal Justice, House Committee on the Judiciary [hereinafter House version], contains no specific privilege rules. The House version would promulgate only a general rule, Rule 501, which provides that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience . . . ." U.S.L.W., Supplement, p. 6, July 17, 1973. The rule does, however, further provide that the Supreme Court may prescribe rules pursuant to statutory authority. Thus, the Supreme Court may some day prescribe rules such as Rule 503 of its version, the literal meaning of which may arguably serve to protect a communication as existed between the investigator and counsel for the defense.

But absent any prescribed rules, common law dictates the federal rules of evidence, and the common law does not protect communications from third persons:

> Since the privilege is designed to secure subjective freedom of mind for the client in seeking legal advice . . . , it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client nor that it came from some particular *third person* for the benefit of the client.

8 Wigmore, Evidence (McNaughton rev. 1961), § 2317(2) (emphasis original).

Defense counsel did strongly assert that to condition impeachment in the manner ordered could infringe upon his client's right against self-incrimination. This problem is indeed troubling.

When Federal Rule of Criminal Procedure 16 was amended in 1966, Justices Black and Douglas dissented. Justice Black wrote: "I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all unconstitutional. . . . And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself." 39 F.R.D. 252, 272 (1966). And Justice Douglas stated:

> The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witness whose appearance at trial is contemplated by the defense. I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 1793-1795, 10 L.Ed.2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the

> defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege.

39 F.R.D. at 277 (footnote omitted).

The "distinguished state court" decision, referenced in the omitted footnote, is *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). In *Jones*, the defendant charged with rape requested a continuance of trial, alleging that he had been impotent for a long time, and the continuance was necessary to gather essential medical evidence. The prosecution responded with a motion for discovery of witnesses, reports, and data concerning the alleged impotence. In holding that the prosecutorial discovery was proper, the California Supreme Court concluded that "since the criminal discovery permitted to the defendant is the result not of a constitutional mandate of due process but rather of the desire to promote orderly ascertainment of truth [discovery] should not be a 'one-way' street." G. Lapides, *Cross-Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U.S.F.L.Rev. 217, 219 (1973), citing *Jones v. Superior Court*, 58 Cal. 2d at 59-60.

More recently, however, the California Supreme Court has virtually limited *Jones* to its facts. In *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), the court wrote:

> Our decision in *Jones* was based primarily upon our conviction that since discovery is a valuable tool for ascertaining the truth, it should be conducted along a "two-way street" in criminal as well as civil proceedings, to the extent permitted by constitutional principles. We readily acknowledge that *pretrial* disclosure would greatly facilitate the administration of criminal justice by minimizing the element of surprise, avoiding unnecessary delays and continuances, reducing inconvenience to the court, counsel, jurors and witnesses, and permitting more effective *pretrial* preparation. However, certain significant developments in the law since *Jones* was decided in 1962 caution us not to extend its holding beyond its facts without careful consideration of the possible effects which such an extension could have upon the accused's rights

> and privileges, and especially his fundamental right not to be compelled to be a witness against himself.
>
> . . .
>
> We had occasion, in *People v. Schader*, 71 Cal.2d 761, 770 [80 Cal. Rptr. 1, 457 P.2d 841], to analyze the policy which underlies the privilege against self-incrimination and recognized, ". . . with the United States Supreme Court, 'that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against the accused out of his own mouth.' (*Malloy v. Hogan* (1964) 378 U.S. 1, 7-8 . . . .) The People must 'shoulder the entire load' of their burden of proof in their *case in chief*, without assistance either from the defendant's silence or from his compelled testimony. [Citations]." (See also *Murphy v. Waterfront Com. of N.Y. Harbor*, 378 U.S. 52, 55 [12 L.Ed.2d 678, 681-682, 84 S.Ct. 1594].)
>
> . . .
>
> Thus, if we analyze *Jones* in the light of the policy considerations discussed in *Schader*, it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an "affirmative defense," or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its *case in chief*. Although the prosecution should not be completely barred from *pretrial* discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him.
>
> An ordinary witness need not actually prove the existence of an incriminatory hazard as that would surrender the very protection which the privilege against self-incrimination was designed to guarantee. Instead, the privilege forbids compelled disclosures which could serve as a "link in a chain" of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circum-

stances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness.

Id. at 323, 325, 326, 466 P.2d at ....., 85 Cal. Rptr. at ..... (footnotes and citations omitted; emphasis supplied).

The California Supreme Court is not alone in this respect. In *United States v. Fratello*, 44 F.R.D. 444, 449, 451 (S.D.N.Y. 1968), Judge Pollack concluded:

> If, therefore, the items sought from the defendants are of a class of evidence which would ordinarily be privileged from disclosure under the Fifth Amendment, the defendants ought not be required to disclose them prior to the establishment on trial of the government's *prima facie* case.
>
> . . .
>
> Until appellate guidance appears which indicates that, in the absence of special circumstances, the price sought by the prosecution for *pre-trial* disclosure of its records is not to be treated as an encroachment on the privilege, this Court is not prepared to condition discovery by the defendant under Rule 16(b) on *pre-trial* disclosure of privileged records in the possession or control of the defendant. In this connection it is noted that Courts usually accept the defendant's view of what records may be self-incriminatory.

Citations omitted; emphasis supplied.

Yet, *Prudhomme* and *Fratello* dealt with pretrial prosecutorial discovery as well as the constitutional concerns of conditioning defense discovery upon the possibility of enhancing the government's case in chief. In the instant case, of course, the discovery would have been during trial and useful only in rebuttal. Then, too, both *Prudhomme* and *Fratello* preceded *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), which upheld the constitutionality of a state's notice of alibi statute in the face of fifth amendment assault. We would, nevertheless, conclude that the fifth amendment remains relevant in the instant circumstances.

In *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973), the Circuit for the District of Columbia faced an analogous situation. The appellant's court-appointed counsel had employed an investigator from the Public Defender Service. The investigator interviewed potential witnesses and sent to counsel a report consisting of summaries of the interviews. At trial the court ordered the investigator who had testified in behalf of the defense to turn over a copy of the report to the government. True, the order was to forward the entire report rather than to specific, relevant portions as were ordered here, but potential incrimination exists in both circumstances.

The court concluded that the principle that criminal discovery must inevitably remain basically a one-way street is firmly imbedded in our common law tradition. *Id.* at 1192. As that circuit also noted,

> There has been some attempt in recent years to increase the Government's right to discovery in criminal cases—for example, through statutes requiring the defense to give pretrial notice of the names of witnesses to be called as part of an alibi defense. But as the Supreme Court has emphasized in holding such statutes constitutional under the Fifth Amendment, they only require the defense to turn over to the Government information which the *defense intends to reveal at trial. See* Williams v. Florida, 399 U.S. 78, 85, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

Id. at 1194. (Emphasis added). In the instant case, the defense prior to the cross-examination of the government's witnesses surely could not have intended to reveal its own information when the witnesses may have admitted its import during cross-examination. And if the witnesses had admitted that they had made such statements as "all blacks look alike" or "I only saw him from the back" to the investigator, the government would have had the responsibility of resurrecting its witnesses' testimony by eliciting any rehabilitating statements by those same witnesses.[2]

---

[2]Enterprising counsel may arguably assert that the evidence doctrine of completeness, *e.g.*, Cal. Evid. Code § 356 and Proposed Federal Rules of Evidence, Court version 107, House version 106, would require disclosure. But as the comment to § 356 by the Assembly Committee on the Judiciary implies, the doctrine is not a discovery device, but rather, only permits certain relevant evidence to be admitted that would otherwise be inadmissible. The burden is on the adversary to "inquire," that is, cross-examine or rebut.

Since the Proposed Federal Rule may shift that burden, *i.e.*, the adversary may "require" admission of the entirety, it would conceivably

Since the witnesses, for whatever reasons, denied making the initial damaging statement, the defense had no alternative but to present its impeachment evidence, *i.e.*, Bond's testimony.[3] If the prosecutor doubted the validity of the contexts in which the purported statements were made as testified to by Bond, he surely had access to his own witnesses and by their testimony could have offered rebuttal to Bond's version. In summary, then, we agree with the Circuit for the District of Columbia that

> The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant. We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused.

Id. at 1195. *See also People v. Bais*, 31 Cal. App. 3d 663 (1st Dist. 1973).

The *Wright* panel also examined that discovery order from the perspective of the Federal Rule of Criminal Procedure 16 and the Jencks Act, 18 U.S.C. § 3500,[4] as we must.

---

be utilized as a discovery tool. But the proposed rule only encompasses writings or recorded statements introduced into evidence, not the testimony of an individual, albeit that his recollection may be memorialized.

[3]That impeachment is the only alternative was not lost to the prosecutor. At the close of trial, he argued:

> Mr. MacIntyre: . . . Mr. Bond never testified in the trial as to anything Mr. Hoffman did or did not say to him.
>
> Mr. Hoffman, you heard his testimony, and I submit to you he denied the questions, said, "No," to the questions that were asked by Mr. Allis. If he testified any differently Mr. Bond would have testified in this courtroom to you as to what the inconsistencies were, and Mr. Bond did not so testify. You heard his testimony.

R.T. at 745, lines 6-14.

[4]The panel in *Wright* gave due consideration to the problem which could arise if a witness refreshed his recollection. (There is nothing in the record to suggest Bond used his reports to refresh his recollection.) That court considered it "hornbook rule of evidence that, had [the investigator] used parts of his report to refresh his recollection while

Before the promulgation of the original rules of criminal procedure, it was doubtful whether criminal discovery was permitted. In 1966, however, Rule 16 was liberalized toward greater discovery.

The pertinent portions of Rule 16 are as follows:

> (b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2) [examinations, tests, experiments], *this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government EXCEPT as provided in 18 U.S.C. § 3500.*
>
> (c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photo-

---

on the witness stand, the prosecution would be entitled to examine those parts of the report and would be permitted to make use of those parts of the report in cross-examining [him]." 489 F.2d at 1188 (emphasis added). As noted by that panel, however, refreshing recollection *prior* to testifying may stand in different posture. *See* McGill v. United States, 270 F.2d 329, 331 (D.C. Cir. 1959); *see also*, Sullivan v. Superior Court, 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1st Dist. 1972) [attorney-client privilege applicable when client previously refreshes recollection].

The Court version of Proposed Rule 612 generally permits an adversary to inspect, cross-examine from, and introduce portions of a writing used by a witness to refresh his recollection either *before or while* testifying. The House version has amended this by requiring the court in its discretion to determine that it be necessary in the interest of justice before a writing be divulged that has been used for prior refreshing of recollection.

graph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, *this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.*

Emphasis and capitalization added.

Each subsection contains a work product[5] savings clause, *i.e.*, the italicized portions. But the government's work product is subject to an important exception, the Jencks Act, 18 U.S.C. § 3500, which provides in relevant part:

---

[5]To apply the work product rule to criminal law is not unusual:

> Although the . . . policies supporting protection of an attorney's work product [have been] stated with reference to civil litigation, they are even more strongly applicable in criminal proceedings. There is "an especially strong tendency toward the protection of materials as the 'work product' of an attorney in criminal cases. Thus, in relevant criminal cases (admittedly few), the courts have *consistently* held statements by witnesses . . . to be the 'work product' of an attorney." Annot., 35 A.L.R.3d 424 (1971) (footnotes omitted) (emphasis added). In State v. Montague, 101 N.J. Super. 483, 244 A.2d 699 (1968) the state sought access to the defendant's attorney's notes concerning interviews with prospective witnesses. The court states:
>
> > "[W]e are satisfied that the notes here in question represented the work product of defendant's attorney and, under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), production should not have been compelled. The fears therein expressed with regard to the inviolability of an attorney's thoughts and the possibility of inefficiency, unfairness and sharp practice are equally applicable to the setting of a criminal case." 244 A.2d at 702.
>
> In re Grand Jury Proceedings, Duffy v. United States, 473 F.2d 840, 846 (8th Cir. 1973).

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Thus, while Rule 16 is framed in terms of *pretrial* discovery, its inclusion of the Jencks Act leads us to conclude that Rule 16 has relevance to discovery *during* trial. And specifically, defense may discover, for purposes of impeachment, statements of government witnesses who have testified. *But* no such exception is included within the terms of subsection (c). We would conclude that the work product of defense is inviolable in these circumstances.[6] *See*

---

[6]We may note that new proposed amendments to the Federal Rules of Criminal Procedure are pending and will be effective August 1, 1974, unless sooner stayed by Congress. It must be noted that the proposed changes include the addition of Rule 12.1, Notice of Alibi, and 12.2, Notice of Defense Based Upon Mental Condition. Also, Rule 16 has

also, United States v. Wright, 489 F.2d 1181, 1189-90 (D.C. Cir. 1973).

Finally, the court may make brief comment upon the alleged misconduct of the prosecutor. A review of the entire transcript permits us to conclude that the prosecutor's conduct does not require reversal. In fact, the record indicates that the trial judge conducted the case most properly, and the defendants received a fair trial.

Affirmed in part, reversed in part, remanded.

---

undergone revision; of particular note is the revised Rule 16(b), Disclosure of Evidence by the Defendant:

(1) Information subject to disclosure.

(A) *Documents and tangible objects.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) *Reports of examinations and tests.* Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(C) *Defense witnesses.* Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

It must be emphasized, however, that Rule 16(b)(2), Information not subject to disclosure, retains the inviolability of internal defense documents.

KILKENNY, Concurring and Dissenting:

BROWN AND SWAIN APPEALS

I concur in the affirmances of the Brown and Swain convictions, but not for the reasons stated by the majority. It is my considered judgment that the records on these appeals are free from error.

NOBLES' APPEAL

Turning now to the Nobles' appeal, I find myself in complete disagreement with the conclusions of the majority on the issue of impeachment by the defense witness, Bond.[1] To understand the issue, it is necessary to outline in detail the events leading up to the action of the trial judge.

On direct examination, the government witness Hoffman identified Nobles as the robber standing under the surveillance camera and also identified him from a photo spread and at a police line-up prior to trial. On cross-examination, Nobles' attorney asked Hoffman, "And isn't it a fact that you told Mr. Bond that to you all the blacks appear to be alike?" Hoffman responded, "I don't believe I indicated that to him." Continuing, the attorney inquired, "You do not recall stating that to Mr. Bond?" Hoffman replied, "No, I do not." Nobles' attorney repeated, "That all blacks look alike." Hoffman responded, "No, I do not, sir." At that time, in a bench conversation outside the presence of the jury, the prosecutor requested defense counsel to furnish a copy of "any interview, notes or recorded statements of Mr. Bond—in regard to a phone call.",[2] and noted "I notice he has a copy, and I would like to have a copy of that at this time before I am able to proceed with redirect examination of the witness." Defense counsel objected. The judge indicated sympathy with the government's view and asked defense counsel to furnish authority indicating that the government was not entitled to the memorandum. After defense counsel, for the second time, rejected the demand of the prosecutor to see the document, the judge conducted a hearing and held that the prosecutor was not entitled to see the investigator's memorandum until Bond took the witness stand and impeached Hoffman's testimony in connection with the memorandum.

---

[1] Chief Investigator, Federal Public Defenders Association.

[2] It is conceded that the conversation was by way of phone.

and then only to the extent that any and all statements of any defendant be excised prior to the delivery to the prosecutor.[3]

Later, defense counsel called Bond. The court inquired as to the nature of Bond's testimony. Counsel responded that the witness would testify as to certain photographs and that ". . . he is going to impeach two statements of Mr. Hoffman." The court then inquired of defense counsel whether he would turn over, at the completion of Bond's testimony, the relevant portions of the document to the prosecution. Defense counsel refused. The court thereupon indicated that those portions of the testimony dealing with the impeachment would be excluded.[4] After an extended colloquy in which the judge fully explained that he would only require the defense to permit inspection of those portions of the memorandum which dealt with the impeaching questions propounded to Hoffman, the court offered to expedite the trial by examining the report *in camera* and there excise such portions not relevant to the Hoffman impeachment. Defense counsel again rejected the court's offer with a statement of his position.[5] Defense counsel then proceeded with the examination of Bond as a defense witness, but did not ask him whether or not Hoffman had made the statement during the telephone conversation of April 6, 1973, ". . . that all blacks appear to be alike."

Obviously, the appellant is in no better position than if Bond had been called, testified that Hoffman had made the statements and on cross-examination was asked if he had made any notes at the time of the telephone conversation, responded that he had and then the prosecutor had asked for the production of the notes. If defense counsel, after a direct order from the judge, failed to produce the notes for inspection, the judge, no doubt, would have ordered the testimony stricken and the jury would have been instructed to disregard it. Here, as often happens in a well-tried case, the judge and the attorneys anticipated the problem and defense counsel was saved the embarrassment of having the testimony stricken in the presence of the jury. It may have been a good trial tactic, but I do not believe appellant is entitled to cash in on it.

The record is clear that defense counsel had the Bond statement on his desk and was utilizing it in connection with the cross-examination of Hoffman. If the trial had followed the customary course and Bond had taken the witness stand, without the preliminary discussions and the court's advisory ruling on the production of the statement, Bond, no doubt, would have said that he used the statement to refresh his memory. For that matter, the record of the proceedings necessarily points to this conclusion. Additionally, there was nothing amateurish about defense counsel's performance and it would be doing him a great injustice to

---

[3]"THE COURT: . . . The Court is going to rule as follows: first of all, the government may not have the memorandum until the witness has taken the stand and has indicated the particular impeaching testimony which was the last part of Mr. Hoffman's testimony relative to his inability to distinguish between people of the black race. And if he does make such a statement, if he and Mr. Bond make such a statement, then I believe the government is entitled to an examination of the memorandum—not before that time—but after that time, after he has completed his entire testimony . . . .

• • • • •

"THE COURT: I will say this to assist you, Mr. Allis, while I think about it. I am sure there are no statements of any of the defendants contained in this particular memorandum, and my order is going only to this particular memorandum. I am not generalizing on any other memorandum or memoranda which you may have. It goes only to this particular memorandum involving the particular witness Hoffman. If you represent to me that there are matters contained therein, such as recitals by the defendants or your defendant, of course, I would view it imperative that you have the opportunity to excise that, perhaps after an in-camera session with the Court, or something of that nature." [R.T. 470-471].

[4]"THE COURT: Mr. Allis is an officer of the court, and [if] Mr. Bond is allowed to testify it would be necessary that those portions of Mr. Bond's investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report.

"If Mr. Allis indicates to me that he refuses to do that, then I am not going to allow the particular witness to testify in that area. Now, it is entirely up to Mr. Allis as to what portion, if any, of Mr. Bond's testimony he wishes to elicit." [R.T. 520].

[5]"MR. ALLIS: My position at this time, your Honor, Rule 16 is that the other discovery consents in the Federal Court, that the Fourth, Fifth and Ninth Amendments protect the defendant in whose possession the reports are from turning them over for any reason.

"THE COURT: We are not talking about pretrial discovery. This is post testimony discovery. It has been carefully considered by the Court, and I am narrowing my ruling to the very specific area." [R.T. 526].

assume that he did not properly prepare the witness by having him read the memorandum. In these circumstances, the price a defendant must pay for having a witness take the witness stand, and testify contrary to declarations of another witness, is to throw open the entire subject to normal cross-examination and to make his testimony vulnerable where, otherwise, it might have been shielded. Surely, the appellant cannot claim for this witness a right which was not available to himself if he had taken the witness stand under the same circumstances.

Closely in point is *Harris v. New York*, 401 U.S. 222 (1971), where the court approved the introduction of a statement on cross-examination which could not have constitutionally been utilized on the direct examination of the defendant. There the court held that the defendant, having voluntarily taken the stand, was under an obligation to speak truthfully and accurately, and that in confronting him with his previous statement, the prosecution was doing no more than utilizing the traditional truth-testing devices of the adversary process. Here, if produced, the memorandum might show that Bond did not include the alleged material forming the basis for the impeaching questions to Hoffman. If that were true, the integrity of Bond's testimony would be severely diminished. The prosecutor, in requesting the production of the statement for cross-examination, was doing ". . . no more than utiliz[ing] the traditional truth-testing devices of the adversary process." 401 U.S. at 225. One of the most common practices employed in the art of cross-examination is to ask for the production of any notes or statements which a witness may have used to refresh his recollection.

The purpose of a trial is to develop the truth, not suppress it. We can assume that appellant's counsel was not playing games and that the memorandum probably made no reference to the impeachment questions propounded to the witness Hoffman. Otherwise, there would be no logical reason for the refusal to produce it.

My conclusions with reference to the questions propounded to Hoffman are equally applicable to the questions propounded to the witness Van Gemeren.

We are not here confronted with pretrial discovery proceedings, such as those before the court in the California cases cited by

the majority, and *United States v. Fratello*, 44 F.D.R. 444, 449, 451 (S.D. N.Y. 1968), speaking to the same type of procedure. Much more akin to our problem, as recognized by the majority, is *Williams v. Florida*, 399 U.S. 78 (1970), where a state notice of alibi statute was upheld in the face of a Fifth Amendment constitutional challenge.

United States v. Wright, 489 F.2d 1181 (CA DC 1973), is closer to the target, but is distinguishable on at least three important grounds: (1) in *Wright* the order was overly broad and required defense counsel to surrender for inspection the entire report, rather than the specific portions relevant only to the impeaching question; (2) there, the prosecutor was seeking the statement to use it as substantive evidence, rather than for impeachment purposes; and (3) *Wright* recognizes, as a Hornbook rule of evidence, that had the investigator used parts of his report to refresh his recollection, the prosecution would be entitled to examine those parts of the report relating to impeachment, and would be permitted to make use of them in the cross-examination. The opinion then goes on to emphasize that the investigator *did not* use the report to refresh his recollection. In *Wright*, there was evidently nothing in the record to warrant the court in assuming that the statement in the investigative report was used by the witness to refresh his recollection. Here, as previously mentioned, I feel that the presence of the statement on counsel table, his use of the statement in interrogating Hoffman and his lengthy colloquy with the court and opposing counsel would clearly indicate that Bond had so refreshed his recollection.

Rule 612, Proposed Federal Rules of Evidence, as submitted to the Congress by the Supreme Court, permits an adversary to inspect, cross-examine on and offer in evidence portions of a writing used by a witness to refresh his recollection either before or while testifying. The House has proposed an amendment which would require the court, in its discretion, to pass on whether the interests of justice would be served by divulging the contents of the writing. The proposed legislation is in line with the *in camera* inspection here suggested by the trial judge. In any event, it is crystal clear that the decision in *Wright* turns on the overbroadness of the order requiring the production of the report. We quote from page 1189:

"In addition, the rules governing documents used to refresh recollection could in no event justify requiring Reeves to turn over his entire investigative report to the prosecution. As a defense witness Reeves testified only as to two matters—his interview with Richardson on January 19 and his examination of the lighting conditions at the scene of the crime. Assuming they had been used to refresh his recollection at trial, those parts of his investigative report relative to this testimony and of possible use to the Government in cross-examining Reeves with respect to this testimony would have to be turned over to the prosecution."

• • • • •

"Even if Reeves used the report to refresh his recollection, only those parts of the report relating to his testimony on direct need have been turned over to the Government."

Here, the majority concedes that the order was stated with precision and limited to the challenged areas of impeachment.

As repeatedly stated by the trial judge, we are not here concerned with the Jencks Act, 18 U.S.C. § 3500, or with Rule 16, FRCrimP. Our problem centers on a simple common law evidentiary question of whether a witness, who was called for impeachment purposes, must produce the notes he admittedly made on the subject of impeachment.

Finding no error, I would affirm the judgment of the lower court.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-20-74—480

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 73–2279, No. 73–2678, No. 73–2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

D.C. No. 12113

APPEALS from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the transcript of record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed in part, reversed in part, remanded.

Filed and entered June 10, 1974.

APPENDIX C

In the United States Court of Appeals for the Ninth Circuit

No. 73–2279, No. 73–2678, No. 73–2280

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TOMMIE LOUIS BROWN; VIRGIL DAVID SWAIN; ROBERT LEE NOBLES, DEFENDANTS-APPELLANTS

Before ELY and KILKENNY, Circuit Judges, and ENRIGHT, District Judge*

Order—Filed September 23, 1974

Judges Ely and Enright have voted to deny the Petition for Rehearing in the subject cases. Judge Ely votes to reject the suggestion for en banc rehearing, and Judge Enright recommends the rejection of such rehearing. Judge Kilkenny votes to grant panel rehearing and, alternatively, recommends the adoption of the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

*Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

U. S. GOVERNMENT PRINTING OFFICE: 1974